Supreme Court, U.S.
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In The
Supreme Court of the United States

LINDA SMART, *et al.*,

Petitioners,

v.

WYETH,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal court is permitted to interfere with ongoing state trial court proceedings by requiring the parties to those proceedings to stipulate to an unorthodox procedure known as "reverse bifurcation," even where it is prohibited by relevant state law, and by imposing a one-sided gag order forbidding plaintiffs (but not defendants) from arguing against reverse bifurcation in the state court.

PARTIES TO THE PROCEEDING*

Petitioners are Clara Clark, Linda Smart, Crystall Gatlin, Doris Caldwell, Mitzi Wilson, Brenda Cook, and Richard Cook, and their agents, attorneys and derivative claimants.

Respondent is Wyeth, formerly American Home Products Corporation.

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* Lonelle James and Linda Eichmiller had been plaintiffs subject to the district court's and court of appeals' injunctions. They are not parties to this petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Clara Clark, *et al.* ("plaintiffs") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-19) is unreported. Memorandum and Pretrial Order Nos. 3888 and 3962 of the district court (App. 20-39), are unreported. The order of the court of appeals denying plaintiffs' petition for rehearing and for rehearing en banc (App. 41-42) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2005. Plaintiffs' timely petition for rehearing was denied on February 24, 2005. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The All Writs Act, 28 U.S.C. § 1651(a), provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The Anti-Injunction Act, 28 U.S.C. § 2283, provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

STATEMENT

This case arises from a multidistrict litigation ("MDL") proceeding involving two prescription diet drugs ("Pondimin" and "Redux") that respondent Wyeth had manufactured and marketed in the U.S. between 1989 and 1997. The Wyeth drugs constituted part of the "fen-phen" diet drug combination. Approximately six million Americans took the drugs from 1995 to 1997, until they were pulled from the market in late 1997. Ultimately, the legal claims of these six million people were resolved in a federal class action settlement that created an administrative compensation scheme for the payment of claims. But the settlement preserved the rights of class members to opt out of the administrative scheme and to pursue claims for compensatory damages in state court. Over 60,000 class members did so.

In this case, the Third Circuit upheld an unprecedented interference in state court proceedings by a federal district court overseeing the federal class action settlement. In particular, the court of appeals upheld an order enjoining plaintiffs opting out of the settlement from proceeding with their state lawsuits unless and until they agreed, through coerced stipulations, to try their state cases under a "reverse bifurcation" model. Reverse bifurcation is an unorthodox

trial procedure under which issues of a plaintiff's injury, causation, and damages are resolved first, followed by a second trial phase addressing the defendant's liability. The court of appeals' ruling requires plaintiffs to stipulate to reverse bifurcation, and not to argue against it, even if they reside in a state where reverse bifurcation is prohibited or highly disfavored in personal injury cases.

The Third Circuit also affirmed a one-sided gag order prohibiting plaintiffs from arguing against the procedure to state courts, while allowing Wyeth to argue for it. Additionally, the court limited plaintiffs' communications with state courts by confining them to answering questions only on specified subjects, and by ordering them to follow a script in their answers.

Not only will the ruling below control tens of thousands of opt-out claims against Wyeth, it also has broad implications for other federal courts administering federal class action settlements. The court of appeals' decision violates principles of federalism and will have substantially deleterious impacts on state courts across the country. Additionally, the Third Circuit's injunction conflicts with decisions by this Court and by other courts of appeals enforcing the Anti-Injunction Act, the All Writs Act, and principles of federalism and comity. Given the importance of the issues presented and the enormous practical significance of the Third Circuit's injunction for tens of thousands of opt-out cases, this Court's review is required.

I. The Diet Drugs Proceeding.

Before and after the diet drugs' withdrawal from the market in 1997, research data and epidemiologic studies

confirmed a causal link between the drugs' use and valvular heart disease (VHD). VHD causes regurgitation, in which blood leaks backward inside the heart, or "regurgitates," through diseased heart valves. VHD can lead to severe health problems, valve replacement surgery, and death. Epidemiological studies also confirmed a causal link between diet drug use and primary pulmonary hypertension, a progressive and fatal disease affecting pulmonary blood circulation.

Accordingly, thousands of individual and class action diet drug lawsuits were filed in state and federal courts. In late December 1997, all pending federal actions were transferred to the U.S. District Court for the Eastern District of Pennsylvania for MDL proceedings. *See In re Diet Drugs Prods. Liab. Litig.*, MDL Docket No. 1203, 990 F. Supp. 834 (J.P.M.L. 1998).

By 2000, a diet drug settlement class, comprising some six million members throughout the nation, was certified and a Settlement Agreement executed. Under the Agreement, the settlement class is composed of all persons (and/or their dependents or representatives) who ingested either Pondimin or Redux, or both.

The Settlement Agreement entitles class members to exercise opt-out rights at various times. Those who chose to opt out initially were exempted entirely from the diet drug settlement, foregoing all benefits and all restrictions. Class members meeting certain medical criteria were permitted to exercise later "downstream" opt-out rights (depending on the timing, either "intermediate" or "back-end" opt-out rights). Downstream opt-outs receive no compensation under the settlement, but are allowed to pursue "settled claims" individually in state and federal

courts, subject to certain restrictions. In particular, they are foreclosed from seeking punitive, exemplary or multiple damages. In exchange, Wyeth and other "Released Parties" may not assert any defense based on limitations. This petition is brought by intermediate opt-out plaintiffs.[1]

II. The District Court's Evidentiary Injunctions.

Plaintiffs Clara Clark and Linda Smart are intermediate opt-outs who sued respondent Wyeth and their physicians in Texas state courts. They sought only actual damages for state-law claims. Similarly, plaintiff Crystall Gatlin filed suit in a Louisiana state court, alleging state-law claims and seeking compensatory damages. The remaining plaintiffs filed similar actions in Mississippi state courts. No plaintiff sought punitive damages.

Nonetheless, from October 2002 through November 2003 the district court issued five evidentiary injunctions against plaintiffs, several of whom were on the verge of trial. The orders barred all state trial evidence related "in any way," "directly or indirectly," to punitive damages – even if the same evidence was relevant and necessary to support claims for compensatory damages, preserved expressly to plaintiffs by the Settlement Agreement.

The Third Circuit unanimously reversed the evidentiary injunctions. *In re Diet Drugs Prods. Liab. Litig.*, 369 F.3d 293 (3d Cir.), *cert. denied*, 125 S.Ct. 439 (2004) ("*Diet Drugs*"). It held that the district court lacked the authority to regulate state court trial proceedings by interfering

[1] Back-end and intermediate opt-outs are subject to the same restrictions and waiver of defenses.

with the admission of evidence relevant both to punitive damages and to permissible claims for compensatory damages. In *Diet Drugs*, the Third Circuit observed in dictum that the district court might consider certain other measures to enforce the terms of the Settlement Agreement, such as ordering the parties to agree to bifurcation – if a state trial court were to deem the procedure advisable. The court ended by directing the district court to modify the evidentiary injunctions in accordance with its opinion. *Id.* at 318-19.

Wyeth sought certiorari, arguing that "[t]he Court of Appeals' decision has widespread implications for the respective roles of the federal and state judiciaries," and "[t]his case has broader implications than merely the particular settlement at issue here." Pet. in No. 04-437, at 2-3. This Court denied review on Nov. 1, 2004.

III. The District Court's Reverse Bifurcation Injunction.

On remand after the *Diet Drugs* decision, on August 30, 2004, the district court issued Memorandum and PTO 3888.[2] App. 20-32. Although the order vacated the district court's prior injunctions, it substituted new restrictions severely impinging upon plaintiffs' state court trials. In particular, PTO 3888 enjoined plaintiffs from proceeding with their various state court cases, unless and until they stipulated to reverse bifurcation. The court also enjoined

[2] Memorandum and PTO 3962, related to PTO 3888, was issued three weeks later. App. 33-39. Because the court of appeals' decision deals with both, references to PTO 3888 include the second order.

them from arguing against the procedure to any state trial court. In relevant part, PTO 3888 provided:

> (3) the parties in the above actions are ordered promptly to agree and stipulate to a reverse-bifurcated trial. . . .
>
> (4) plaintiffs, their agents, attorneys, and derivative claimants in the above actions are ENJOINED from trying their actions unless and until the said written Stipulations are filed with the state trial court; and
>
> (5) plaintiffs, their agents, attorneys, and derivative claimants in the above actions are ENJOINED from arguing to the state trial court that the reverse-bifurcation procedure or jury instruction set forth in the aforesaid Stipulations should not be used.

App. 31-32.

IV. The Court of Appeals' Decision Under Review.

On appeal, the Third Circuit issued an unpublished opinion concluding that "[f]or the most part, the terms of PTO 3888 are appropriate." *Id.* at 11. Nonetheless, the court "suggested" certain changes. *Id.* at 12-14. One revision dealt with paragraph (4), which echoes the district court's injunction:

> (4) The parties are ordered promptly to agree and stipulate to . . . a reverse-bifurcated trial in which the issues of causation, injury and compensatory damages are to be tried first and apart from liability. . . .

The only distinction was the addition of the following last sentence: "However, the state trial court will make the

ultimate determination on reverse bifurcation. . . ." *Id.* at 15. The court of appeals prohibited plaintiffs from proceeding with their trials until they complied with paragraph (4):

> (5) Plaintiffs, their agents, attorneys and derivative claimants in the above actions are ENJOINED from trying their actions unless and until they have filed the . . . written stipulations [agreeing to reverse bifurcation] described in provision (4) with the state trial court. . . .

The court also imposed a unilateral gag order (with certain narrow exceptions) upon plaintiffs and counsel, but not defendants:

> (6) Plaintiffs, their agents, attorneys and derivative claimants, are ENJOINED from arguing to the state trial court that the reverse bifurcation procedure . . . that they stipulated to pursuant to provision (4) should not be used; however, [they] may respond to questions or inquiries from the state trial court about matters which may affect the state trial court's decision to reverse bifurcate . . . including, but not limited to, applicable legal precedent about bifurcation, the potential length of the trial, the number of witnesses, and the relatedness of evidence to the phases of a reverse bifurcated trial;

Id. And, the court mandated a script governing plaintiffs' communications with state trial courts, as noted in paragraph (6):

> (7) If asked by the state trial court whether reverse bifurcation is appropriate, advisable or should otherwise be implemented, plaintiffs, their agents, attorneys and derivative claimants must answer, "I am directed by the United States

> District Court for the Eastern District of Pennsylvania to stipulate to the use of a reverse bifurcated trial and I am not permitted to argue or otherwise make statements against this court's discretionary use of that procedure;"

Id. at 16. The court of appeals remanded the case for further proceedings in accordance with its opinion.

On Feb. 24, 2005, the Third Circuit denied plaintiffs' timely motion for panel rehearing and rehearing en banc. *Id.* at 40-42. On Mar. 3, 2005, it denied plaintiffs' motion to publish the opinion.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because the injunction imposed by the Third Circuit improperly sanctions federal interference with state court trials in a class action settlement with tens of thousands of opt-out plaintiffs. The decision below will disrupt thousands of state-court proceedings across the country. The practical significance of the ruling below is immense.

Reverse bifurcation is an unorthodox trial procedure unknown to most state courts, disfavored by many others, and legally barred in others, such as Texas, where two plaintiffs' cases are filed. Yet the Third Circuit has forced plaintiffs to stipulate to its use in state courts, and to refrain from arguing against the procedure. Given the vast numbers of opt-outs under the diet drug settlement, the federal injunction will interfere with potentially thousands of state court trials. The injunction will prevent plaintiffs from fully informing state courts as to whether reverse bifurcation is permitted at all in the relevant jurisdiction,

as well as whether it is unsuitable in a particular case. The disruptive effects of the injunction will be felt in courts throughout the U.S.

Wyeth previously sought certiorari in No. 04-437, emphasizing the importance of the federal class action settlement in this case. It was appropriate for this Court to deny review in No. 04-437, because the Third Circuit's initial decision in *Diet Drugs* did not violate principles of federalism. But the crystallization of the views of both the court of appeals and the district court in the decisions below means that the issue is now ripe for certiorari. The conflict with the decisions of this Court and of other circuits is stark.

The district court has already made clear that the court of appeals' injunction in this case will be applied to other plaintiffs. In early February 2005 – after the court of appeals had released its opinion in this case – the district court relied on that opinion in issuing another order (Memorandum and PTO 4481), enjoining two Georgia plaintiffs. The injunction repeated verbatim the order outlined in the Third Circuit's opinion. The district court explained that "the Court of Appeals has now spoken definitively on the proper form of a reverse bifurcation order." PTO 4481, at 12 (E.D. Pa. Feb. 10, 2005). Thus, the court of appeals' decision in this case will have widespread implications for thousands of parties in addition to plaintiffs. While technically non-published and non-precedential, it is governing law in the Third Circuit and will extend to state courts throughout the United States.

This Court's review is also required because the decision below conflicts with the rulings of this Court and of other circuits on such important issues as the Anti-Injunction Act,

the All Writs Act, and principles of federalism and comity. Neither the Third Circuit nor Wyeth could cite any comparable injunction and gag order issued by any other federal district court, much less any affirmed by a court of appeals. Because the Third Circuit's holding is inconsistent with precedent of this Court and of other circuits, it merits plenary review.

I. The Third Circuit's Decision Violates Principles of Federalism.

Few questions are as important to our legal system as the proper balance between federal and state authority. The Third Circuit's decision upsets that balance and will disrupt thousands of state court proceedings across the country. Plaintiffs are required to stipulate to reverse bifurcation and are enjoined to be silent unless and until the state court initiates a "question" or "inquiry" regarding reverse bifurcation. But even when addressing the state judge, plaintiffs must confine their responses to certain issues and are required, on pain of contempt, to adhere to a federally mandated script. The fact that the injunction is nominally addressed to the parties rather than the state court itself in no way lessens the violation of principles of federalism. *See Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs,* 398 U.S. 281, 297 (1970); *Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co.*, 309 U.S. 4, 9 (1940). The court of appeals' attempt to impose reverse bifurcation from afar is a recipe for federal-state conflict, confusion and delay.

A. The Third Circuit's Decision Forces a Prohibited or Disfavored Trial Procedure upon State Courts.

"The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." *Howlett v. Rose*, 496 U.S. 356, 372 (1990) (internal quotation marks and citation omitted). Yet every plaintiff forced to agree to reverse bifurcation resides in a jurisdiction where the procedure is either barred or greatly disfavored. And, the injunction's constraints upon plaintiffs' ability to communicate openly with state courts carries a significant risk that the state courts will be misinformed about reverse bifurcation in their jurisdictions.

For example, Texas law (governing plaintiffs Clark and Smart) has for decades prohibited the bifurcation of liability issues from compensatory damages in personal injury cases. According to the Texas Supreme Court, state procedure "does not authorize separate trials of liability and damage issues in personal injury litigation." *Iley v. Hughes*, 311 S.W.2d 648, 651 (Tex. 1958). The state supreme court has consistently enforced that rule. *See, e.g., Southwestern Ref. Co. v. Bernal*, 22 S.W.3d 425, 430 (Tex. 2000), in which the court held improper a bifurcation order scheduling a trial on punitive damages before liability and causation for certain class action plaintiffs; *see also Eubanks v. Winn*, 420 S.W.2d 698, 701 (Tex. 1967); *Estrada v. Dillon*, 44 S.W.3d 558, 562 (Tex. 2001).[3]

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[3] The district court had cited *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994), as support for its injunction. *See also* TEX. CIV. PRAC. & REM. CODE ANN. § 41.009 (codifying *Moriel*). But *Moriel* involved a narrow exception allowing the *amount* of punitive damages

(Continued on following page)

Similarly, in Mississippi (where plaintiffs Wilson, Caldwell, and the Cooks reside), state trial courts have rejected reverse bifurcation in initial opt-out cases not governed by the diet drug Settlement Agreement. *See Hampton v. Wyeth*, Holmes County Circuit Court, No. 2001-453; *Amos v. Wyeth*, Holmes County Circuit Court, No. 200-293; *Card v. AHP Corp.*, Tallahatchie County Circuit Court, No. 2000-36-C72. And, Louisiana statutory law (applicable to plaintiff Gatlin) forbids bifurcation without the consent of all parties. *See* LA. CODE CIV. PROC. ANN. art. 1562.

Those states are hardly unusual. Many others have rejected or severely limited the use of reverse bifurcation, and sometimes even ordinary bifurcation. And none has ordered the procedure in wholesale fashion. *See, e.g., Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238, 1245 n.7 (Utah 1998) (reverse bifurcation is "so drastic a technique" that it "has never been employed in Utah"); *Waters ex rel. Skow v. Pertzborn*, 627 N.W. 2d 497, 502-03 (Wis. 2001) (state statute forbids bifurcation of liability and damages). As one state supreme court explained, "duplication [of evidence] would burden both witnesses and jurors as well as waste judicial resources." *Darcars Motors of Silver Spring, Inc. v. Borzym*, 841 A.2d 828, 843 (Md. 2004) (citation omitted). Another opined that "reverse bifurcation would result in significant confusion of the complex issues . . . [and] would [not] permit the parties to present evidence in an organized and effective order." *State ex rel.*

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to be addressed separately from the balance of the trial, when requested. It provides no authority for bifurcating the liability and causation/damages phases, and certainly no support for *reverse* bifurcation, in which causation and damages are tried first.

Atkins v. Burnside, 569 S.E.2d 150, 161 (W. Va. 2002). And, a third held that "a litigant has no right to a bifurcation of issues" since "[t]he decision . . . must be left to the sound discretion of the trial judge." Moreover, it continued, "bifurcation . . . [will be warranted] in only the most exceptional cases and upon a strong showing of necessity." *Ennix v. Clay*, 703 S.W.2d 137, 139 (Tenn. 1986). *See also Wingo v. Rockford Mem. Hosp.*, 686 N.E.2d 722, 730 (Ill. App. 2 Dist. 1997) (noting "the administrative inconvenience and the prejudice to the plaintiffs"); *ABB Indus. Sys., Inc. v. Prime Tech., Inc.*, 32 F. Supp. 2d 38, 44 (D. Conn. 1998) (a second trial phase "would seem to unnecessarily prolong the litigation"); *Nicoletti v. Gates*, No. CV972377, 2002 WL 1364114, *2 (C.D. Cal. June 21, 2002) ("bifurcation will not be conducive to expedition and judicial economy and would involve unnecessary costs and consumption of more time").

This Court has cautioned that in some situations bifurcation could "amount to a denial of a fair trial." *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931). That is because evidence "has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict." *Old Chief v. United States*, 519 U.S. 172, 187 (1997). Therefore, when bifurcation is considered, "the trial judge should be alert to the danger that evidence relevant to both issues may be offered at only one-half of the trial . . . [p]articularly . . . in . . . personal injury litigation, where the issues of liability and damages are generally interwoven and the evidence bearing upon the respective issues is commingled and

overlapping." *Stevenson v. General Motors Corp.*, 521 A.2d 413, 422-23 (Pa. 1987) (internal quotation marks and citation omitted).

In short, reverse bifurcation presents difficult questions of state law – both as a matter of a state court's authority to employ it at all, and as a matter of the court's discretionary decision to use it in a particular case. The Third Circuit's blanket directive interferes with that discretion by ensuring that state courts receive a misleading, one-sided presentation on questions of reverse bifurcation. A balanced discussion is precluded, even though reverse bifurcation is an aberrant procedure that requires untrammeled argument. In practical terms, the injunction will hamstring plaintiffs and significantly disrupt tens of thousands of proceedings in state courts across the nation.

B. The Third Circuit's Decision Significantly Interferes with a State Court's Authority over Trial Proceedings.

Although reverse bifurcation must be decided case by case, the court of appeals' decision applied a uniform national rule across the board. The court justified its inexcusable intrusion into state court proceedings throughout the country by stating that the injunction acknowledged state court authority to order reverse bifurcation. App. 14. Yet that authority is hardly meaningful when the injunction prevents one set of parties from providing adequate argument to the state court regarding the advisability of the procedure. The injunction thus deprives state courts of the information they need to exercise informed judgment and discretion, even if on paper they ostensibly retain the final say in the process engineered by a federal judge. Under the injunction,

plaintiffs must remain silent unless and until a state trial court specifically requests their input on reverse bifurcation. But since the state court will already have been presented with a forced stipulation reflecting plaintiffs' supposed consent, it is questionable whether their input will even be requested.

Moreover, the injunction is a recipe for further state court litigation and confusion. Because its vague terms raise as many questions as they answer, the injunction will serve only to embroil the federal district court more deeply, and wrongfully, in state court proceedings. *See* FED. R. CIV. P. 65(d) (requiring specificity and reasonable detail); *see also Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) ("The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood.") (citations omitted). For example, although paragraph (6) permits plaintiffs to "respond to questions or inquiries from the state trial court," the injunction fails to define an "inquiry" or "question." Must an inquiry or question be oral, and specifically directed to plaintiffs' counsel? Assuming a state judge makes a statement in open court that applicable state law favors reverse bifurcation, may plaintiffs' counsel address the statement if it is incorrect? Or would a declaratory statement fail to qualify as a question or inquiry? Further, does a defendant's written motion for reverse bifurcation count as a question or inquiry? Likewise, would a scheduling order or response deadline be considered a question or inquiry? A wrong guess could lead to contempt.

In addition, paragraph (6) lacks any guideline as to the contents of a response. For instance, the Third Circuit

has enjoined plaintiffs from arguing that reverse bifurcation should not be used. Yet if plaintiffs respond to a state court's question by noting the likelihood of jury confusion, the adverse impact on the plaintiff's presentation of her case, and other practical problems arising from reverse bifurcation, does the response qualify as argument against the procedure?

The Third Circuit's decision impermissibly put into force a one-size-fits-all federal order governing the day-to-day matters that state courts should control on a case-by-case basis. Litigation is fluid, not static, and issues often cannot be anticipated, let alone dictated in advance by a single federal court. This Court should grant review to establish that the Third Circuit's injunction is invalid and that such attempts to interfere with state-court proceedings are not permitted.

C. The Third Circuit's Decision Impermissibly Alters the Terms of a Sweeping Federal Class-Action Settlement.

This Court should grant review for the further reason that the Third Circuit's decision effectively amends the diet drug class action settlement by adding a reverse bifurcation provision that the parties never negotiated. The Settlement Agreement contemplates the right of opt-out plaintiffs to proceed in state court, and its terms say nothing about the possibility – much less, the necessity – that those trials might be bifurcated (reverse or otherwise). As class counsel explained to the district court, "the subject of reverse bifurcation did not even come up during the settlement negotiations." Class Counsel's Mem. of Law Pursuant to PTO 3890, filed Sept. 15, 2004, at 7-8 (Docket 2:99-cv-20593-HB, No. 1351).

The only provision of the Agreement cited by the court of appeals was the one barring downstream opt-out plaintiffs from seeking punitive damages. App. 5. Far from justifying the reverse bifurcation injunction, however, the punitive damage provision demonstrates its invalidity. Plaintiffs are already prohibited from seeking punitive damages, and they do not contest the injunction's bar against their introducing evidence or argument relevant *exclusively* to punitive damages (*e.g.*, evidence of respondent's financial status). These provisions eliminate any need for the reverse bifurcation injunction. The parties to the settlement contemplated that evidence of Wyeth's tortious misconduct would be introduced in state-court suits brought by downstream opt-outs – and yet the Settlement Agreement imposed no requirement that such proceedings be "reverse bifurcated" for fear that the settlement's bar on punitive damages would otherwise be circumvented.

In the end, the injunction arises from the court of appeals' distrust of state courts, and its suspicion that they will not properly implement the settlement. But that premise is illegitimate. A federal court may not presume that a state court is incapable of correctly interpreting federal law. If a state proceeding concerns an issue under a federally approved Settlement Agreement, "[t]he proper course is to seek resolution of that issue by the state court." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 150 (1988).

II. The Third Circuit's Judgment Conflicts with Decisions of This Court and of Other Circuits.

Certiorari is warranted for the further reason that the Third Circuit's judgment conflicts with a long line of

decisions by this Court and other courts of appeals. Those decisions strictly limit the authority of federal courts to interfere with ongoing state proceedings.

A. This Court has Recognized Important Principles Protecting Ongoing State Court Proceedings.

"Cooperation and comity, not competition and conflict, are essential to the federal design." *Kowalski v. Tesmer*, 125 S.Ct. 564, 569 (2004). "Dual sovereignty is a defining feature of our Nation's constitutional blueprint. . . . States . . . did not consent to become mere appendages of the Federal Government." *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751 (2002) (citations omitted). Dual sovereignty extends to the judiciary, making "federal and state courts . . . complementary systems for administering justice in our Nation." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586 (1999). Because the independence of state courts is essential, "state judicial systems [must be maintained] for the decision of legal controversies." Therefore, "[e]ach system proceeds independently of the other with ultimate review in this Court." *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 285-86 (1970).

These principles of federalism are reflected in a constellation of rules demanding federal judicial respect for state courts – all of which the Third Circuit has violated. For example, the All Writs Act limits the powers of federal courts by providing that injunctions may be issued only when "necessary or appropriate in aid of their jurisdiction and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). "Due regard for the rightful independence of state governments . . . requires that [federal

courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002) (citation omitted).

Next, the Anti-Injunction Act prohibits a federal court from enjoining, directly or indirectly, an ongoing proceeding in state court, except in three specified circumstances: "as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. Thus, the Act "imposes an absolute ban upon the issuance of a federal injunction against a pending state court proceeding, in the absence of one of [its] recognized exceptions." *Mitchum v. Foster*, 407 U.S. 225, 228-29 (1972); *see also Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630 (1977); *Atlantic Coast Line*, 398 U.S. at 286.

In addition, the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), prevents a federal court from interfering in ongoing state judicial proceedings. *Younger* abstention applies when there is an ongoing state judicial proceeding that implicates an important state interest and provides an adequate opportunity to raise the federal issue. Although *Younger* itself was a criminal case, the abstention doctrine that it spawned applies to civil proceedings as well. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 (1987); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982).

This Court applied *Younger* abstention in *Pennzoil*, prohibiting a federal court from enjoining the application of Texas bonding rules despite Texaco's claim that the rules effectively precluded its appeal. The Court deferred "on principles of comity to the pending state proceedings,"

thus barring an "unprecedented intrusion into the Texas judicial system." 481 U.S. at 17, 10.

The Court has recognized that, together, the All Writs Act, the Anti-Injunction Act, and principles of federalism and comity severely limit the authority of federal courts to issue injunctions that interfere with state judicial proceedings. "[E]ven where the prayer for injunctive relief does not seek to enjoin the state . . . proceedings themselves . . . principles of equity nonetheless militate heavily against the grant of an injunction except in the *most extraordinary circumstances.*" *Rizzo v. Goode*, 423 U.S. 362, 379 (1976) (emphasis supplied). *See also Huffman v. Pursue, Ltd.*, 420 U.S. 592, 603-04 (1975).

Outside the Third Circuit, other courts of appeals have faithfully enforced these important federalism values. They "take seriously the mandate in the Anti-Injunction Act and recognize that for over two hundred years, the Act has helped to define our nation's system of federalism." *Employers Res. Mgmt. Co., Inc. v. Shannon*, 65 F.3d 1126, 1130 (4th Cir. 1995). *See, e.g., De Cosme v. Sea Containers, Ltd.*, 874 F.2d 66, 68-69 (1st Cir. 1989) ("principles of comity and federalism" precluded injunction of state court proceeding to enforce federal settlement); *Retirement Sys. v. J.P. Morgan Chase & Co.*, 386 F.3d 419, 425-26 (2d Cir. 2004) (injunction not "necessary" under Anti-Injunction Act to protect possibility of MDL settlement); *Denny's, Inc. v. Cake*, 364 F.3d 521, 530 (4th Cir.), *cert. denied*, 125 S.Ct. 344 (2004) (federal injunction barred even if no state-court proceeding was pending when federal suit was instituted).

B. The Third Circuit's Judgment Conflicts with Decisions Honoring Principles of Judicial Federalism.

The Third Circuit's judgment cannot be reconciled with decisions of this Court and of other circuits honoring the important principles of judicial federalism. The court of appeals presumed that state courts are incapable of deciding for themselves, on the basis of a full presentation by all parties, whether reverse bifurcation is appropriate in a given case. On that basis, the court approved a one-sided injunction that will skew state-court proceedings: it will not only require plaintiffs to stipulate to reverse bifurcation, it will also limit the ability of plaintiffs – but not defendants – to communicate with state judges regarding the procedure. Thus, the federal injunction applies *regardless* of whether state courts have deemed reverse bifurcation advisable and *before* the state courts have had the opportunity to hear the parties' arguments. The decision reflects a fundamental mistrust of state courts, rather than comity and cooperation between federal and state courts.

The notion that a federal court may micromanage a state court proceeding – to the point of prescribing a specific script for a plaintiff's attorney to use when addressing the state judge – is incompatible with the "etiquette of federalism." *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring). State courts are to be treated as coequal partners in Our Federalism, not as marionettes whose decisions are to be manipulated from afar by a Philadelphia federal court.

The Third Circuit made no finding that its injunction was "necessary" under the All Writs Act or that, absent an injunction, the issue of reverse bifurcation could not be

raised in ongoing state proceedings. Indeed, such a finding would have been untenable. The state courts obviously stand ready to apply their own bifurcation rules and, where need be, to interpret the federally approved Settlement Agreement. Accordingly, the Third Circuit's ruling conflicts with this Court's decisions concerning both *Younger* abstention and the All Writs Act.

Nor can the Third Circuit's opinion be squared with this Court's teachings on the Anti-Injunction Act. The sum total of the court of appeals' analysis was the following:

> [S]tate court actions must be tried in accordance with the settlement agreement, particularly the damage limitations. . . . PTO 3888 strikes an appropriate balance between accomplishing the herculean task of upholding the terms of the settlement while simultaneously respecting the state courts' ability to conduct a trial in accordance with that agreement.

App. 11-12. The Third Circuit did not even purport to identify the Anti-Injunction Act exception, if any, upon which it was supposedly relying. By itself, that failure constitutes a conflict with this Court's precedent.

The Anti-Injunction Act does not incorporate a "balancing" test of the sort applied by the court of appeals. Rather, subject to three narrow exceptions, the Act flatly bars federal injunctions that interfere with state judicial proceedings. The Act "is not a statute conveying a broad general policy for appropriate ad hoc application." Rather, it is "expressed in a clear-cut prohibition qualified only by specifically defined exceptions," which may not be "enlarged . . . by loose statutory construction." *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511,

515-16 (1955); *Atlantic Coast Line*, 398 U.S. at 287. Its stringent standards may not be "whittled away by judicial improvisation." *Vendo Co.*, 433 U.S. at 631 (citation omitted). The court of appeals' decision cannot be reconciled with this Court's interpretation of the Anti-Injunction Act.

The Third Circuit made no finding that the "in aid of jurisdiction" exception applied; nor could such a finding be made. In *Vendo Co.*, this Court reversed an injunction of state-court proceedings, holding that a simultaneous state suit did not interfere with the jurisdiction of a federal court to entertain a damages action: "We have never viewed parallel in personam actions as interfering with the jurisdiction of either court. . . ." *Id.* at 642. *See also Kline v. Burke Constr. Co.*, 260 U.S. 226, 230 (1922) ("[E]ach court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court.").

Thus, the Sixth Circuit has noted that under this Court's narrow interpretation of the exception, "a pending state suit must truly interfere with the federal court's jurisdiction. . . ." *Roth v. Bank of the Commonwealth*, 583 F.2d 527, 535 (6th Cir. 1978); *see also United States v. Ford Motor Co.*, 522 F.2d 962, 965-66 (6th Cir. 1975) (state suit for damages does not qualify under "in aid of jurisdiction" exception). And, similarly, the Ninth Circuit has rejected an injunction to protect a federal MDL class action. *Alton Box Board Co. v. Espirit de Corp.*, 682 F.2d 1267, 1272 (9th Cir. 1982). *See also In re Temple*, 851 F.2d 1269, 1272 (11th Cir. 1988) ("Not only does the district court's order implicate federal/state relations, it clearly violates the individual constitutional rights of the petitioners."); *In re BankAmerica Corp. Sec. Litig.*, 263 F.3d 795, 801 (8th Cir. 2001) (reaching same conclusion).

Further, the Third Circuit made no finding that another of the Anti-Injunction Act's exceptions, "to protect or effectuate . . . judgments," was applicable. Because the Settlement Agreement says nothing about reverse bifurcation, the test plainly could not be met here.

For the same reason, the injunction cannot fall within the relitigation exception to the Anti-Injunction Act, which requires "that the claims or issues which the federal injunction insulates from litigation in the state proceedings [must] actually have been decided by the federal court." *Chick Kam Choo*, 486 U.S. at 148. The standard is "strict and narrow," depending on "what the earlier federal order *actually* said . . . not . . . what the order was *intended* to say." *Id.* (emphasis added). Here, the prior federal order adopting the settlement was silent regarding reverse bifurcation.

The court of appeals' injunction cannot be reconciled with this Court's governing precedent, or with decisions in other circuits. This Court's review is amply warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 04-3591, 04-3643 and 04-4096

IN RE: DIET DRUGS
(PHENTERMINE/FENFLURAMINE/
DEXFENFLURAMINE)
PRODUCTS LIABILITY LITIGATION

Clara Clark and her agents, attorneys and derivative claimants; Linda Smart and her agents, attorneys and derivative claimants; Linda Eichmiller and her agents, attorneys and derivative claimants; Crystall Gatlin and her agents, attorneys and derivative claimants; Lonelle James and her agents, attorneys and derivative claimants; Doris Caldwell and her agents, attorneys and derivative claimants; Mitzi Wilson and her agents, attorneys and derivative claimants; Brenda Cook and Richard Cook and their agents, attorneys and derivative claimants,

Appellants at No. 04-3591

IN RE: CLARA CLARK, and her agents, attorneys and derivative claimants; LINDA SMART, and her agents, attorneys and derivative claimants; LINDA EICHMILLER, and her agents, attorneys and derivative claimants; CRYSTALL GATLIN, and her agents, attorneys and derivative claimants; LONELLE JAMES, and her agents, attorneys and derivative claimants; DORIS CALDWELL, and her agents, attorneys and derivative claimants; MITZI WILSON, and her agents, attorneys and derivative claimants; BRENDA COOK and RICHARD COOK, and their agents, attorneys and derivative claimants,

Petitioners at No. 04-3643

IN RE: DIET DRUGS (PHENTERMINE/
FENFLURAMINE/DEXFENFLURAMINE)
PRODUCTS LIABILITY LITIGATION

Clara Clark and her agents, attorneys and derivative claimants; Linda Smart and her agents, attorneys and derivative claimants; Linda Eichmiller and her agents, attorneys and derivative claimants; Crystall Gatlin and her agents, attorneys and derivative claimants; Lonelle James and her agents, attorneys and derivative claimants; Doris Caldwell and her agents, attorneys and derivative claimants; Mitzi Wilson and her agents, attorneys and derivative claimants; Brenda Cook and Richard Cook and their agents, attorneys and derivative claimants,

Appellants at No. 04-4096

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. MDL 1203)
District Court Judge: Honorable Harvey Bartle, III

Argued November 16, 2004
Before: ROTH, SMITH and WEIS, Circuit Judges.
(Filed: January 25, 2005)

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OPINION

WEIS, Circuit Judge.

The underlying issues here involve claims of personal injury caused by the use of two appetite suppressant drugs produced and distributed by Wyeth. We provided a lengthy summary of the facts in our opinions at 369 F.3d 293 (3d Cir. 2004) and 282 F.3d 220 (3d Cir. 2002). Consequently, we will limit our restatement of the background here.

I.

In the mid-1990s, data surfaced suggesting a link between use of the Wyeth diet drugs and valvular heart disease (VHD) in humans. As a result, thousands of lawsuits were filed against Wyeth in state and federal courts. The Judicial Panel for Multidistrict Litigation transferred all the federal actions to the United States District Court for the Eastern District of Pennsylvania.

In 1999, the parties reached a tentative settlement agreement for a nationwide class. In exchange for Wyeth's payment of $3.75 billion, the agreement provided that settling class members would release Wyeth from all VHD claims. After conducting a fairness hearing, the District Court entered a final order certifying the class and approving the settlement on August 28, 2000. The terms of the settlement agreement and the final order indicated that the District Court shall have continuing jurisdiction to administer, interpret and enforce the settlement agreement.

Class members were entitled to opt out of the settlement agreement initially, at an intermediate stage or at the "back-end." Those who decided to opt-out at the intermediate stage were informed that the scope of their claims would be limited and specifically they were precluded from "seeking" punitive, exemplary, or multiple damages. The settlement agreement reads,

> "[Intermediate opt-outs] may not seek punitive, exemplary, or any multiple damages against [Wyeth];. . . . [Intermediate opt-outs] may not use any previous verdicts or judgments against [Wyeth], or factual findings necessary to such verdicts or judgments, for purposes of establishing claims or facts in order to obtain a verdict or judgment. . . . Nor may [an intermediate opt-out] . . . seek to introduce into evidence against [Wyeth], for any purpose, such a verdict, judgment or factual finding."

In return for these limitations, Wyeth agreed not to assert any statute of limitations, laches, or similar defenses against the intermediate opt-outs.

In state courts, most of the opt-out plaintiffs pleaded their claims in terms that appeared to abide by the prohibition on seeking punitive damages. However, tactics employed during litigation demonstrated that some plaintiffs were attempting to obtain punitive-type damages through such means as inflated mental anguish recovery and by presenting evidence of reprehensible conduct by Wyeth.

A. Initial Injunctions

In response to the attempted circumvention of the punitive damages bar, the District Court issued PTO 2625 in plaintiff Clara Clark's case as well as a similar pretrial order, PTO 2828, applicable to other plaintiffs. In addition, the court issued PTO 3088 enjoining plaintiffs from making arguments related to punitive damages and malicious or wanton conduct by Wyeth, as well as prohibiting them from introducing specific categories of evidence and identified exhibits.

B. Initial Appeal

Plaintiffs appealed, contending that the injunctions did not comply with the settlement agreement or notions of federalism. On May 25, 2004, we vacated PTO 2828 and remanded with instructions to the District Court to modify its pre-trial orders.[1] *In re Diet Drugs*, 369 F.3d at 317-19. We concluded that the District Court had the power, under the All Writs Act, to effectuate and protect the terms of the settlement through pretrial injunctions affecting state court proceedings. However, we cautioned that opt-outs must be able to fairly litigate the claims preserved under the agreement, and that "intrusion into state court proceedings should be minimized." *Id.* at 317.

We noted that PTO 2828 was appropriate in so far as it prohibited the parties from:

---

[1] We addressed our opinion to PTO 2828, directed to Clark; however, we also noted that the District Court would presumably "modify all orders" at issue in the appeal in accordance with the revisions to PTO 2828.

> (i) introducing any evidence relevant "exclusively" to punitive damages, specifically evidence of Wyeth's:
>
> (a) profits, size or financial condition, and
>
> (b) amount or size of sales of diet drugs or other products; and
>
> (ii) making "'any statement or argument to the . . . jury related directly to evidence relevant only to punitive damages.'"

Id.

In addition to specifically approving portions of PTO 2828, we required that the following provisions be excised:

> (i) categorical evidentiary restrictions that barred evidence relevant to proving VHD claims;
>
> (ii) limitations on exhibits and deposition testimony that precluded evidence relevant to VHD claims; and
>
> (iii) prohibitions on "making any statement or argument to the court" on matters other than those specified.

Id. at 317-18.

Finally, in addition to the required revisions and specifically approved provisions, we suggested that the District Court consider other measures aside from imposing evidentiary restraints,

> "for example, ordering language to be included in a stipulation or proposed jury instruction that would make it clear to the jury that exemplary damages may not be awarded. Or . . . direct[ing]

> the parties to agree to a bifurcated trial-where damages are determined apart from liability-in the event that the state court were to deem it advisable."

Id. at 318.

C. PTO 3888 and District Court Actions Thereafter

In response to our May 2004 opinion and after hearing argument from the parties, the District Court issued PTO 3888[2] which reads as follows:

> "AND NOW, on this 30th day of August, 2004, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:
>
> (1) Pretrial Orders ("PTO") Nos. 2680, 2828, 2883, 3088, and 3123 are VACATED;
>
> (2) plaintiffs, their agents, attorneys, and derivative claimants are ENJOINED from introducing any evidence, or making any statements before or argument to [the] jury related to:
>
> (a) punitive, exemplary, or multiple damages;
>
> (b) Wyeth's profits, size, or financial condition; or

[2] This appeal was filed by the plaintiffs in seven state cases. They collectively appealed from Pretrial Order No. 3888 entered on August 30, 2004. Following the issuance of PTO 3888, the District Court filed Pretrial Order No. 3962 which addressed the plaintiffs' emergency motion to stay PTO 3888's injunction pending appeal. Agreeing to adopt the brief filed in the PTO 3888 appeal, plaintiffs appealed PTO 3962 on October 26, 2004.

(c) the amount or size of Wyeth's sales of diet drugs or other products;

in the following cases: *Smart v. American Home Prods., Inc.*, No. 02-04-40259-CV (Jim Wells County, Tex.) (PTO No. 2680); *Clark v. Wyeth, et al.*, No. B020282-C (Orange County, Tex.) (PTO No. 2828); *Wilson, et al. v. Wyeth, et al.*, No. 03cv305BN (S.D. Miss.), and *James, et al. v. Wyeth, et al.*, No. 2002-95 (Smith County, Miss.) (PTO No. 2883); *Eichmiller v. American Home Products Corp.*, Civil Action No. 2002CV52077 (Fulton County, Georgia), *Cook, et al. v. Wyeth*, Cause No. 2002-21 (Hinds County, Miss.), and *Caldwell v. American Home Products Corp.*, No. 2002-113-CV3 (Jones County, Miss.) (PTO No. 3088); *Gatlin v. American Home Products Corp., et al.*, No. 2003-4007 (Orleans Parish, La.) (PTO No. 3123);

(3) the parties in the above actions are ordered promptly to agree and stipulate to a reverse-bifurcated trial, that is a trial in which the issues of causation, injury and compensatory damages only are tried first and apart from liability and to agree and stipulate to a jury instruction that punitive, multiple or exemplary damages may not be awarded;

(4) plaintiffs, their agents, attorneys, and derivative claimants in the above actions are ENJOINED from trying their actions unless and until the said written Stipulations are filed with the state trial court; and

(5) plaintiffs, their agents, attorneys, and derivative claimants in the above actions are ENJOINED from arguing to the state trial court that the reverse-bifurcation procedure or jury

> instructions set forth in the aforesaid Stipulations should not be used.

The District Court elaborated on and clarified certain provisions in PTO 3888 during a hearing on September 20, 2004 and incorporated its comments into the Memorandum accompanying PTO 3962. The Court noted that the mandatory stipulation for reverse bifurcation should not be effective "unless and until the state court judge rules that reverse bifurcation is advisable." The District Court also noted that it had inadvertently neglected to use the term "exclusively" in referring to the introduction of evidence or advancing arguments about punitive damages.

II.

Petitioners filed appeals with this Court as to PTO 3888 and PTO 3962, as well as an emergency petition for writ of mandamus. Because we have jurisdiction over the appeals under 28 U.S.C. § 1292(a)(1), we need not address mandamus. *See In re Chambers Development Co., Inc.*, 148 F.3d 214, 226 (3d Cir. 1998).

The terms of an injunction are reviewed for an abuse of discretion. *In re Diet Drugs*, 369 F.3d at 304-05; *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 261 F.3d 355, 363 (3d Cir. 2001). We apply plenary review to a district court's construction of a settlement agreement; review of the factual elements is pursuant to the clear error standard. *Coltec Indus., Inc. v. Hobgood*, 280 F.3d 262, 269 (3d Cir. 2002).

III.

Plaintiffs argue that the three major provisions in PTO 3888, that is, the evidentiary restrictions, the mandatory stipulation provision and the prohibition of argument against use of reverse bifurcation or the jury instruction, should be vacated. Plaintiffs contend that the stipulation for reverse bifurcation is not necessary, is a violation of the Anti-Injunction Act and is inappropriate because the procedure is not permitted, or is disfavored, in some jurisdictions.

Moreover, plaintiffs contend that banning argument against use of reverse bifurcation or the jury instruction unfairly limits counsel's representation in the state court and presents an ethical dilemma by binding counsel to a position their clients do not support. Finally, plaintiffs assert that due process prohibits subjecting class members to understandings that were not expressed or made sufficiently specific in the class notice or settlement agreement.

After carefully considering the plaintiffs' arguments, we agree with the District Court that the state court actions must be tried in accordance with the settlement agreement, particularly the damage limitations. These plaintiffs do not have unfettered causes of action in state courts and conduct that attempts to evade the settlement cannot be permitted. Allowing plaintiffs to defy the punitive damages bar would make a mockery of the agreement and the District Court's jurisdiction.

For the most part, the terms of PTO 3888 are appropriate. They do not enmesh the District Court in extensive micro-management of the state court litigation. As we pointed out in our May 2004 opinion, in some instances

the injunctions that predated PTO 3888 resulted in the district judge "effectively adopt[ing] the role of a trial judge in balancing the probative value of evidence against unfair prejudice" to Wyeth. That approach would have resulted in the District Court conducting a "nuanced" and "contextual" evidentiary balancing that should be employed at the pretrial stage "only as an extreme measure." *In re Diet Drugs*, 369 F.3d at 314.

By avoiding detailed review of evidentiary matters, PTO 3888 strikes an appropriate balance between accomplishing the herculean task of upholding the terms of the settlement while simultaneously respecting the state courts' ability to conduct a trial in accordance with that agreement. As a consequence, PTO 3888 does not transgress the limits of federalism and is in conformance with the settlement agreement.

Given the plaintiffs' concerns about the limitations on arguments in the state courts over reverse bifurcation or the jury instruction, we believe that some clarification is in order. In the Memorandum accompanying PTO 3962, the District Court stated that PTO 3888 was not meant to "prevent the parties from providing any input requested by the [state] judge as to the advisability of reverse-bifurcation" following the submission of the stipulation. Similarly, at the hearing on September 20, 2004, Wyeth's counsel agreed that plaintiffs should be able to respond to whatever concerns the state court might have about how reverse bifurcation or the jury instruction would "work." PTO 3888 would be improved by a brief elaboration.

We suggest that the injunction be amended so that plaintiffs would be free to respond to inquiries from the state court about ancillary issues including, but not

limited to, precedent in the jurisdiction applicable to the use of reverse bifurcation particularly in light of mutual consent by the parties; how the issues in a reverse bifurcated trial should be tried and the language to be used in a jury instruction prohibiting a punitive damages award. However, the order should prohibit plaintiffs from stating to the state court that reverse bifurcation or the jury instruction should not be used.

We suggest that the District Court revise three provisions of PTO 3888 that plaintiffs claimed were problematic – the evidentiary restriction, the mandatory stipulation provision and the prohibition of argument against use of reverse bifurcation or the jury instruction. Specifically, a revision of the prohibition of argument against use of reverse bifurcation or the jury instruction could provide counsel with a predetermined method for responding to inquiries from state courts while simultaneously adhering to, and acting in accordance with, the terms of the injunction and the settlement agreement. Such provisions would alleviate counsel's concerns about ethical dilemmas, proper representation of their clients' interests and the possibility of facing contempt proceedings.

The term "exclusively" should be added to the evidentiary restriction provision in accordance with our previous opinion and statements from the District Court.

Finally, we suggest modifying PTO 3888 so that the mandatory stipulation provisions clearly state that the state courts will make the ultimate determination of whether to employ reverse bifurcation or the jury instruction. Similarly, we suggest that the District Court confirm

the state courts' authority over the admission of impeachment or rebuttal evidence about topics otherwise encompassed in the evidentiary restriction. Acknowledgment of state court authority over these matters is in keeping with our previous observation that state judges are "capable and willing to enforce the settlement without close and intrusive supervision by the District Court" or excessive "entanglement" in their ability to supervise judicial proceedings in the courtroom. *In re Diet Drugs*, 369 F.3d at 317.

We believe that our suggestions could be incorporated in PTO 3888 by restating its language with a few modifications so that it would now read:

(1) Pretrial Order Nos. 2680, 2828, 2883, 3088 and 3123 are VACATED;

(2) Plaintiffs, their agents, attorneys, and derivative claimants are ENJOINED from introducing any evidence, or making any statements before or argument to the jury exclusively related to: (a) punitive, exemplary, or multiple damages; (b) Wyeth's profits, size or financial condition; or (c) the amount or size of Wyeth's sales of diet drugs or other products; in the following cases: *Smart v. American Home Prods., Inc.*, No. 02-04-40259-CV (Jim Wells County, Tex.) (PTO No. 2680); *Clark v. Wyeth, et al.*, No. B030282-C (Orange County, Tex.) (PTO No. 2828); *Wilson, et al. v. Wyeth, et al.*, No. 03cv305BN (S.D.Miss.) and *James, et al. v. Wyeth, et al.*, No. 2002-95 (Smith County, Miss.) (PTO No. 2883); *Eichmiller v. American Home Products Corp.*, Civil Action No. 2002CV52077 (Fulton County, Georgia), *Cook, et al. v. Wyeth*, Cause No. 2002-21 (Hinds County, Miss.), and *Caldwell v. American Home Products Corp.*, No. 2002-113-CV3 (Jones County, Miss.) (PTO No. 3088);

Gatlin v. American Home Products Corp., et al., No. 2003-4007 (Orleans Parish, La.) (PTO No. 3123);

(3) Admission of any evidence, statements or arguments by plaintiffs, their agents, attorneys, and derivative claimants related to topics (a) – (c) of provision (2) for purposes of impeachment or rebuttal shall be at the state trial court's discretion;

(4) The parties are ordered promptly to agree and stipulate to: (a) a reverse-bifurcated trial in which the issues of causation, injury and compensatory damages are to be tried first and apart from liability; and (b) a jury instruction that punitive, multiple or exemplary damages may not be awarded. However, the state trial court will make the ultimate determination on reverse bifurcation and the jury instruction;

(5) Plaintiffs, their agents, attorneys, and derivative claimants in the above actions are ENJOINED from trying their actions unless and until they have filed the two written stipulations described in provision (4) with the state trial court;

(6) Plaintiffs, their agents, attorneys and derivative claimants are ENJOINED from arguing to the state trial court that the reverse bifurcation procedure or jury instruction that they stipulated to pursuant to provision (4) should not be used; however, plaintiffs, their agents, attorneys and derivative claimants may respond to questions or inquiries from the state trial court about matters which may affect the state trial court's decision to reverse bifurcate or to give the jury instruction including, but not limited to, applicable legal precedent about bifurcation, the potential length of the trial, the number of witnesses,

and relatedness of evidence to the phases of a reverse bifurcated trial;

(7) If asked by the state trial court whether reverse bifurcation is appropriate, advisable or should otherwise be implemented, plaintiffs, their agents, attorneys and derivative claimants must answer "I am directed by the United States District Court for the Eastern District of Pennsylvania to stipulate to the use of a reverse bifurcated trial and I am not permitted to argue or otherwise make statements against this court's discretionary use of that procedure;" and

(8) If asked by the state trial court judge whether to utilize, or whether it would be appropriate or advisable to utilize, the jury instruction described in the parties' stipulations, plaintiffs, their agents, attorneys and derivative claimants must answer 'I am directed by the United States District Court for the Eastern District of Pennsylvania to stipulate to a jury instruction that punitive, multiple or exemplary damages may not be awarded and I am not permitted to argue against this court's discretionary use of such an instruction.'

Accordingly, we will remand the case to the District Court for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 04-3591, 04-3643 and 04-4096

IN RE: DIET DRUGS (PHENTERMINE/
FENFLURAMINE/DEXFENFLURAMINE)
PRODUCTS LIABILITY LITIGATION

Clara Clark and her agents, attorneys and derivative claimants; Linda Smart and her agents, attorneys and derivative claimants; Linda Eichmiller and her agents, attorneys and derivative claimants; Crystall Gatlin and her agents, attorneys and derivative claimants; Lonelle James and her agents, attorneys and derivative claimants; Doris Caldwell and her agents, attorneys and derivative claimants; Mitzi Wilson and her agents, attorneys and derivative claimants; Brenda Cook and Richard Cook and their agents, attorneys and derivative claimants,

Appellants at No. 04-3591

IN RE: CLARA CLARK, and her agents, attorneys and derivative claimants; LINDA SMART, and her agents, attorneys and derivative claimants; LINDA EICHMILLER, and her agents, attorneys and derivative claimants; CRYSTALL GATLIN, and her agents, attorneys and derivative claimants; LONELLE JAMES, and her agents, attorneys and derivative claimants; DORIS CALDWELL, and her agents, attorneys and derivative claimants; MITZI WILSON, and her agents, attorneys and derivative claimants; BRENDA COOK and RICHARD COOK, and their agents, attorneys and derivative claimants,

Petitioners at No. 04-3643

IN RE: DIET DRUGS (PHENTERMINE/
FENFLURAMINE/DEXFENFLURAMINE)
PRODUCTS LIABILITY LITIGATION

Clara Clark and her agents, attorneys and derivative claimants; Linda Smart and her agents, attorneys and derivative claimants; Linda Eichmiller and her agents, attorneys and derivative claimants; Crystall Gatlin and her agents, attorneys and derivative claimants; Lonelle James and her agents, attorneys and derivative claimants; Doris Caldwell and her agents, attorneys and derivative claimants; Mitzi Wilson and her agents, attorneys and derivative claimants; Brenda Cook and Richard Cook and their agents, attorneys and derivative claimants,

Appellants at No. 04-4096

Appeal from the United States District Court for the
Eastern District of Pennsylvania (D.C. No. MDL 1203)
District Court Judge: Honorable Harvey Bartle, III

Argued November 16, 2004
Before: ROTH, SMITH and WEIS, Circuit Judges.

JUDGMENT

This case came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania. On consideration whereof, it is now hereby

ORDERED AND ADJUDGED by this Court that the pretrial orders of the District Court entered on August 30, 2004, PTO 3888, and on September 22, 2004, PTO 3962,

be, and the same are hereby remanded for further consideration.

All of the above is in accordance with the Opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron
Clerk

Dated: January 25, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: DIET DRUGS (PHENTERMINE/ FENFLURAMINE/ DEXFENFLURAMINE) PRODUCTS LIABILITY LITIGATION	:	MDL DOCKET NO. 1203
THIS DOCUMENT RELATES TO:	:	
SHEILA BROWN, et al.	:	
v.	:	
AMERICAN HOME PRODUCTS CORPORATION	:	CIVIL ACTION NO. 99-20593

MEMORANDUM AND PRETRIAL ORDER NO. 3888

Bartle, J.

August 30, 2004

Upon instruction from our Court of Appeals, we now revisit and modify several injunctions entered to enforce the Nationwide Class Action Settlement Agreement ("Settlement Agreement") in this Diet Drug Litigation involving Wyeth's[1] drugs Pondimin and Redux. *See In re Diet Drugs Prods. Liab. Litig.* (*"In re Diet Drugs"*), 369 F.3d 293 (3d Cir. 2004).

The Settlement Agreement, approved by this court in Memorandum and Pretrial Order ("PTO") No. 1415, allows class members, under certain circumstances, to exercise

[1] Wyeth was formerly known as American Home Products.

either an intermediate or back-end opt-out. In return for Wyeth's waiver of the statute of limitations, those class members may sue Wyeth in the tort system, but "[a] Class Member timely and properly exercising an Intermediate [or Back-End] Opt-Out right may not seek punitive, exemplary, or any multiple damages." Settlement Agreement §§ IV.D.3.c and IV.D.4.c. Under the Settlement Agreement and PTO No. 1415, this court has an ongoing duty to enforce the Settlement Agreement. *See* Settlement Agreement § VIII.B.1; PTO No. 1415 at ¶ 11.

In a number of instances, this court found that class members who had exercised intermediate opt-outs and had filed state court actions were intent on circumventing the Settlement Agreement prohibition against punitive damages. As a result, we enjoined class members from doing so in the cases of *Smart v. American Home Prods., Inc.*, No. 02-04-40259-CV (Jim Wells County, Tex.) (PTO No. 2680); *Clark v. Wyeth, et al.*, No. B020182-C (Orange County, Tex.) (PTO No. 2828); *Wilson, et al. v. Wyeth, et al.*, No. 03cv305 BN (S.D. Miss.) and *James, et al. v. Wyeth, et al.*, No. 2002-95 (Smith County, Miss. (PTO No. 2883); and *Eichmiller v. American Home Products Corp.*, Civil Action No. 2002CV52077 (Fulton County, Ga.), *Cook, et al. v. Wyeth*, Cause No. 2002-21 (Hinds County, Miss.), and *Caldwell v. American Home Products Corp.*, No. 2002-113-CV3 (Jones County, Miss.) (PTO No. 3088). The injunctions prohibited the plaintiffs or their agents, attorneys, or derivative claimants from introducing evidence or making statements or arguments to or before the court or the jury which we concluded would have had the sole or predominant purpose of inflaming the jury to award punitive damages in fact if not in name.

In the *Clark* case, even after plaintiff and her counsel had been enjoined initially, plaintiff's subsequent filings with the state court clearly demonstrated the intent not to comply with this court's injunction. *Id.* Indeed, this court was compelled to find counsel for plaintiff Clark in civil contempt. *Id.* Ultimately, we reviewed and excluded certain individual exhibits and deposition testimony in *Clark* so as to ensure compliance with the Settlement Agreement and this court's orders prohibiting claims for punitive damages. *Id.*

Since the entry of PTO Nos. 2680, 2828, 2883, and 3088, and before the Court of Appeals decision on May 25, 2004, we entered a similar injunction, PTO 3123, in the case of *Gatlin v. American Home Products Corp., et al.*, No. 2003-4007 (Orleans Parish, La.) (now set for trial on September 20, 2004 in New Orleans, La.).

Our Court of Appeals has repeatedly recognized the ability of a federal district court overseeing a nationwide class action settlement to issue an injunction under the "in aid of its jurisdiction" exception to the Anti-Injunction Act, 28 U.S.C. § 2283. *See, e.g., In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 314 F.3d 99, 104 (3d Cir. 2002). In its recent opinion, the Court noted "the patent efforts by plaintiffs' counsel to press against the damages restrictions to which intermediate opt-outs are bound," and recognized that "[a]llowing state court actions to run afoul of [the punitive damages release] provision would fatally subvert it and render the agreement (and the Court's jurisdiction) nugatory. The District Court's ability to give effect to that provision is necessary in aid of its jurisdiction." *In re Diet Drugs*, 369 F.3d at 307, 318.

Consistent with this court's "unquestioned right to effectuate the restraints of the settlement," the Court of Appeals agreed that we properly banned evidence relating to Wyeth's size, profits, sales figures, or financial condition, as those things are not probative of liability, causation, or compensation. *Id.* at 312, 317-18. Also properly excluded were statements or arguments made to the jury "'related directly' to evidence relevant only to punitive damages." *Id.* at 318.

The Court of Appeals, however, found that the injunctions entered by this court in PTO Nos. 2680, 2828, 2883, and 3088 were too broad in certain respects and remanded with instructions to modify them in accordance with its opinion. *Id.* at 318-19. It directed that part of the injunctions previously entered were problematic under principles of federalism, comity, and equity in that they "disrupt[ed] the state court's ability to manage its own judicial process" and did not "minimize[] entanglement in the state judge's ability to supervise judicial proceedings in his own courtroom." *Id.* at 317-318. The Court of Appeals determined that the Settlement Agreement imposes "no limitation on VHD-related claims or causes of action. Moreover, there is no expression that opportunities to recover for mental anguish, pain, or loss of consortium will be impeded or hampered. . . . so long as forms of damages other than those specifically forbidden were sought." *Id.* at 310.

Despite its mandate that we modify the injunctions at issue, the Court of Appeals forcefully acknowledged the demonstrated need for this court to effectuate and protect the terms of the Settlement Agreement from efforts to undermine it. The Court characterized the actions of some opt-out lawyers as nothing less than "guerilla warfare" against the Settlement Agreement. *Id.* at 304. It made

clear that this court is "free to consider other measures, aside from imposing evidentiary restraints, that will effectuate the limitations of the settlement." *Id.* at 318. One specific proposal made by the Court of Appeals was that "the Court could direct the parties to agree to a bifurcated trial – where damages are determined apart from liability – in the event that the state court were to deem it advisable." *Id.* Thus, while the state trial judge would have the final word, we may require the parties to consent to bifurcation and file their consent with the trial judge.

None of the parties previously sought a bifurcation order from this court. Wyeth now requests that we modify the injunctions in PTO Nos. 2680, 2828, 2883, and 3088 so as to direct the parties to agree to reverse-bifurcate their trials in accordance with the suggestion of the Court of Appeals. The plaintiffs oppose such a modification.

Reverse-bifurcation is a procedure that allows the court to try the issues of damages prior to trying the issues of liability. Depending on the jury verdict on damages, the need for a further trial on liability may not be necessary. Reverse-bifurcation has particular merit here because it virtually eliminates the possibility that evidence related to punitive damages will be introduced at the damages phase of the trial in violation of the Settlement Agreement. A trial on damages would necessarily encompass evidence of injury and causation as well as compensatory economic and non-economic loss. Excluded from this phase of the trial would be issues of liability such as Wyeth's negligence, defective design, failure to warn, misrepresentation, and fraud. It is under the guise of such liability evidence that certain class members have sought to

circumvent the Settlement Agreement's ban on punitive damages.

In vacating our injunctions, the Court of Appeals was particularly concerned with the ability of the trial judge to rule on evidence without interference by this court and the need to minimize involvement in the state courts' supervision of their judicial proceedings. Ordering the parties to agree to reverse-bifurcation subject to the state court judge's approval avoids these problems. This court would not be making evidentiary rulings. Moreover, since only injury, causation, and compensatory loss would be encompassed in a damages trial, the state trial judge would be highly unlikely to admit evidence related to punitive damages since such evidence could only be pertinent, if at all, to liability and would have no relevance to compensatory damages. Thus, reverse bifurcation significantly diminishes the chance of any violation of the Settlement Agreement while preserving the role of the state trial judge in any trial. A two-step trial will also allow the trial judge to admit whatever evidence he or she deems appropriate under state law with respect to a class member's proof of liability if that aspect of the case goes forward after damages have been determined. Our Court of Appeals has announced that this court is "not without recourse" to impose post-trial remedies, should the Settlement Agreement's ban on punitive damages be violated at the state court trial. *Id.* at 318. Reverse-bifurcation should reduce the need for such after-the-fact intervention by this court.

The use of bifurcated trials is not a novel concept, particularly in the world of mass torts. *See, e.g., In re Paoli R.R. Yard PCB Litig.*, 113 F.3d 444, 452 n.5 (3d Cir. 1997). It has been used extensively in asbestos cases. *See, e.g.,*

Shetterly v. Raymark Indus., Inc., 117 F.3d 776, 782 (4th Cir. 1997); and *Angelo v. Armstrong World Indus., Inc.*, 11 F.3d 957, 964-65 (10th Cir. 1993). Several recent trials in the Court of Common Pleas of Philadelphia County, Pennsylvania have gone forward using the reverse-bifurcation procedure in cases involving Pondimin and/or Redux.

Bifurcation may not be the usual, much less the preferred, method for trying cases in ordinary circumstances. *See Lis v. Robert Packer Hospital*, 579 F.2d 819 (3d Cir. 1978). However, we are not here dealing with ordinary circumstances. As has been stated repeatedly, the Settlement Agreement prohibits class members who exercise an intermediate or back-end opt-out from seeking punitive damages against Wyeth. As the Court of Appeals recognized, the bar is "a central pillar of the settlement agreement." *In re Diet Drugs*, 369 F.3d at 306. Unfortunately, we have seen far too many instances in which plaintiffs and their attorneys have sought to cause that pillar to come tumbling down by efforts to interject proofs related to punitive damages into the trial of their cases in the state courts. If the pillar crashes, the bargain the parties agreed to and approved by this court in PTO No. 1415 will be severely undermined. The reverse-bifurcation solution fits the unusual, if not unique, situation we face here.

Those plaintiffs who have actions pending in the Texas state courts argue that bifurcated trials are not authorized in that jurisdiction. They cite to *Iley v. Hughes*, 311 S.W.2d 648 (Tex. 1958), in which the Texas Supreme Court opined that Rule 174(b) of the Texas Rules of Civil

Procedure,[2] which mirrors Rule 42(b) of the Federal Rules of Civil Procedure,[3] does not provide for separate trials of liability and damage issues and should not be read to overturn the longstanding state policy of avoiding "piecemeal trials." *Id.* at 365-66. In *Iley*, of course, one of the parties objected to bifurcation, while in the present situation the state court would have a stipulation of the parties agreeing to such a procedure. In any event, *Iley* is not the last word on the subject.

The Texas Supreme Court modified its opinion in *Iley* in the more recent decision, *Transportation Insurance Company v. Moriel*, 879 S.W.2d 10 (Tex. 1994). In *Moriel*, the court considered the question of whether evidence of the defendant's net worth for use in determining an appropriate punitive damages award would be overly prejudicial to the defendant if presented with the other issues of the case. *Moriel*, 879 S.W.2d at 30. Because the court found that there was a "very real potential" that the defendant could be prejudiced as to the jury determination of other disputed issues in the case by highlighting its relative wealth, the court determined that a trial court

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[2] Rule 174(b) reads: "Separate trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues."

[3] Rule 42(b) reads: "Separate trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States."

should bifurcate the determination of the amount of punitive damages from the remaining issues. *Moriel*, 879 S.W.2d at 30. "Although we remain resolute that piecemeal trials as a general rule should be avoided, given the importance of the considerations we have discussed, we conclude that punitive damages should be the exception to the rule." *Moriel*, 879 S.W.2d at 30, n.29.

Thus, the Texas Supreme Court has recognized an exception to the rule against bifurcation when the issue of punitive damages is involved. Here, there is a similar concern about evidence related to punitive damages infecting the jury's damage deliberations.[4]

Accordingly, we will require the parties in the above actions to enter into a written stipulation agreeing to a reverse-bifurcated trial. This means that the parties shall stipulate and agree to proceed first with a trial on causation, injury, and compensatory damages only without reference to any liability issues as explained above. Unless and until such a stipulation is signed and filed with the state court, plaintiffs will be enjoined from proceeding to trial.

Contrary to what plaintiffs argue, we are not in any way interfering with the action or power of the state court judge. We fully understand, as the Court of Appeals noted,

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[4] Plaintiffs also raised the specter of ethical problems if parties are required to agree to a reverse-bifurcation stipulation to which they would not agree absent a court order. We find this argument to be without merit. Every day throughout the land, courts enter orders requiring parties or their counsel to take actions which they would not take voluntarily. Finally, we are simply following the suggestion of our Court of Appeals. We reject the notion that it is suggesting anything unethical.

that the state court will make the ultimate decision as to how the trial should proceed, what evidence to admit, and whether it is advisable to accept the stipulation. *In re Diet Drugs*, 369 F.3d at 318. Nonetheless, plaintiffs and their counsel may not be allowed to do indirectly what they may not do directly. They will be prohibited from urging the state court to reject any pending or anticipated request for a reverse-bifurcated trial. Otherwise, a party or counsel would be attempting to eviscerate this court's order and would be acting in a way which in our view would be contrary to the intent of the Court of Appeals. That Court's proposal would be an empty gesture if the parties either before or after agreeing to reverse-bifurcation could argue to the trial judge to ignore any such agreement.

Because it is a "central pillar" of the Settlement Agreement that no punitive damages be claimed or awarded and because the solution suggested by the Court of Appeals is now the best available to ensure this result, we are confident that state court judges will see the wisdom of the outlined procedure in the special circumstances presented by these diet drug cases. Moreover, if the state court judge proceeds in this manner, any post-trial proceedings in this court to overturn an infected state court verdict, as alluded to by our Court of Appeals, will most likely be avoided.[5]

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[5] At the suggestion of the Court of Appeals, we will also order the parties to stipulate to a jury instruction that will make it clear that punitive or exemplary multiple damages may not be awarded. *See In re Diet Drugs*, 369 F.3d at 318.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: DIET DRUGS (PHENTERMINE/ FENFLURAMINE/ DEXFENFLURAMINE) PRODUCTS LIABILITY LITIGATION	:	MDL DOCKET NO. 1203
THIS DOCUMENT RELATES TO:	:	
SHEILA BROWN, et al.	:	
v.	:	
AMERICAN HOME PRODUCTS CORPORATION	:	CIVIL ACTION NO. 99-20593

PRETRIAL ORDER NO. 3888

AND NOW, on this 30th day of August, 2004, for the reasons set forth in the accompanying Memorandum, it is hereby **ORDERED** that:

(1) Pretrial Order ("PTO") Nos. 2680, 2828, 2883, 3088, and 3123 are VACATED;

(2) plaintiffs, their agents, attorneys, and derivative claimants are ENJOINED from introducing any evidence, or making any statements before or argument to jury related to:

(a) punitive, exemplary, or multiple damages;

(b) Wyeth's profits, size, or financial condition; or

(c) the amount or size of Wyeth's sales of diet drugs or other products;

in the following cases: *Smart v. American Home Prods., Inc.*, No. 02-04-40259-CV (Jim Wells County, Tex.) (PTO No. 2680); *Clark v. Wyeth, et al.*, No. B020182-C (Orange County, Tex.) (PTO No. 2628); *Wilson, et al. v. Wyeth, et al.*, No. 03cv305 BN (S.D. Miss.) and *James, et al. v. Wyeth, et al*,. No. 2002-95 (Smith County, Miss. (PTO No. 2883); *Eichmiller v. American Home Products Corp.*, Civil Action No. 2002CV52077 (Fulton County, Georgia), *Cook, et al. v. Wyeth*, Cause No. 2002-21 (Hinds County, Miss.), and *Caldwell v. American Home Products Corp.*, No. 2002-113-CV3 (Jones County, Miss.) (PTO No. 3088); *Gatlin v. American Home Products Corp., et al.*, No. 2003-4007 (Orleans Parish, La.) (PTO No. 3123);

(3) the parties in the above actions are ordered promptly to agree and stipulate to a reverse-bifurcated trial, that is a trial in which the issues of causation, injury and compensatory damages only are tried first and apart from liability and to agree and stipulate to a jury instruction that punitive, multiple or exemplary damages may not be awarded;

(4) plaintiffs, their agents, attorneys, and derivative claimants in the above actions are ENJOINED from trying their actions unless and until the said written Stipulations are filed with the state trial court; and

(5) plaintiffs, their agents, attorneys, and derivative claimants in the above actions are ENJOINED from arguing to the state trial court that the reverse-bifurcation

procedure or jury instruction set forth in the aforesaid stipulations should not be used.

BY THE COURT:

/s/ Harvey Bartle
J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: DIET DRUGS (PHENTERMINE/ FENFLURAMINE/ DEXFENFLURAMINE) PRODUCTS LIABILITY LITIGATION	:	MDL DOCKET NO. 1203
THIS DOCUMENT RELATES TO:	:	
SHEILA BROWN, et al.	:	
v.	:	
AMERICAN HOME PRODUCTS CORPORATION	:	CIVIL ACTION NO. 99-20593

MEMORANDUM AND PRETRIAL ORDER NO. 3962

Bartle, J. September 22, 2004

Now before the court is "opt-out plaintiffs' emergency motion to stay PTO 3888's injunction pending appeal" (Doc. No. 206317).

I.

Among other things, Pretrial Order ("PTO") No. 3888 requires the parties subject to it to agree to reverse-bifurcation of their trials. The agreement is not effective unless and until the state court judge concludes that such a procedure is advisable. This injunction applies only to the class members in the cases of: *Smart v. American Home Prods., Inc.*, No. 02-04-40259-CV (Jim Wells County, Tex.) (PTO No. 2680); *Clark v. Wyeth, et al.*, No. B020182-C

(Orange County, Tex.) (PTO No. 2828); *Wilson, et al., v. Wyeth, et al.*, No. 03cv305 BN (S.D. Miss.) and *James, et al. v. Wyeth, et al.*, No. 2002-95 (Smith County, Miss.) (PTO No. 2883); *Eichmiller v. American Home Prods. Corp.*, Civil Action No. 2002CV52077 (Fulton County, Ga.), *Cook, et al. v. Wyeth*, Cause No. 2002-21 (Hinds County, Miss.), and *Caldwell v. American Home Products Corp.*, No. 2002-113-CV3 (Jones County, Miss.) (PTO No. 3088); and *Gatlin v. American Home Products Corp., et al.*, No. 2003-4007 (Orleans Parish, La.) (PTO No. 3123). We held oral argument on the stay motion on September 20, 2004 pursuant to PTO No. 3928.

We agree that the issue on appeal is an important one that could have a major impact on the enforcement of the provision prohibiting the award of punitive damages under the Nationwide Class Action Settlement Agreement in this litigation involving Wyeth's diet drugs Pondimin and Redux. *See* Settlement Agreement §§ IV.D.3.c., IV.D.4.c. Appellants make a persuasive argument for a stay, for it will give the Court of Appeals an opportunity to pass on an issue which is not only significant for the parties here involved but may also serve as an important precedent in other opt-out cases. Nonetheless, should we grant the stay as requested, PTO No. 3888 would be rendered moot for any party subject to it whose action goes to trial during the pendency of the appeal. We note that no trial date has been set in any of the above cases, with the exception of the *Gatlin* case, which is set for trial on October 4, 2004. In order to preserve the status quo, we will grant the stay for any plaintiff who obtains a postponement of his or her trial until a resolution of the appeal. Otherwise, the stay will be denied. *Ortho Pharm. Corp. v. Amgen, Inc.*, 887 F.2d 460 (3d Cir. 1989).

II.

We take this opportunity for the benefit of the parties and the Court of Appeals to expand our explanation of PTO No. 3888 as set forth in the Memorandum accompanying that order.

The Court of Appeals ruled our injunctions in PTO Nos. 2680, 2828, 2883, 3088, and 3123 were overly broad in certain respects and that we had not been sufficiently cognizant of comity, federalism, and notions of equity. *In re Diet Drugs Products Liability Litigation* ("*In re Diet Drugs*"), 369 F.3d 293, 307, 317-18 (3d Cir. 2004). Among other things, the Court directed us not to make specific evidentiary rulings affecting the state trials. *Id.* at 317-18. However, it did approve the injunctions insofar as they enjoined class members from introducing evidence "relevant exclusively to 'punitive, exemplary or multiple damages, however described,' which specifically includes evidence of '(a) Wyeth's profits, size or financial condition'; and '(b) the amount or size of Wyeth's sales of diet drugs or other products.'" *Id.* at 318. It also authorized this court to direct the parties to agree to a bifurcated trial subject to approval of the state court. It stated:

> our opinion leaves the District Court free to consider other measures, aside from imposing evidentiary restraints, that will effectuate the limitations of the settlement agreement. The District Court might consider, for example, ordering language to be included in a stipulation or proposed jury instruction that would make it clear to the jury that exemplary damages may not be awarded. *Or, the Court could direct the parties to agree to a bifurcated trial – where damages are determined apart from liability – in*

> *the event that the state court were to deem it advisable.*

Id. (emphasis added).

As a result of *In re Diet Drugs*, we vacated PTO Nos. 2680, 2828, 2883, 3088, and 3123, and issued PTO No. 3888. First, PTO No. 3888 continues to enjoin the use of certain evidence, which the Court of Appeals agreed was exclusively related to punitive damages. The injunction should be read in conformity with that Court's opinion. PTO No. 3888 also implemented the Court's decision concerning reverse-bifurcation. This procedure is an effective means to uphold the prohibition against punitive damages in the Settlement Agreement by eliminating, at a damages trial, inflammatory evidence which may be relevant to liability. At the same time it minimizes the federal court's intrusion into the evidentiary rulings and other proceedings before the trial judge.

One of the points of contention is the court's order that the parties sign a consent for a reverse-bifurcated trial, subject to state court approval, before the state court judge decides whether it is advisable and thus before a decision whether to proceed with a separate damages trial. We do not think it was the intent of the Court of Appeals simply to allow this court to direct bifurcation after the state court had decided that it was advisable. Doing so would be nothing more than a perfunctory act on our part since the trial court, once it deemed bifurcation advisable, would have already ordered it or taken whatever action it intended to follow. If we did anything other than rubber-stamp that decision, we would not be giving the state court the last word as required by the Court of Appeals. Directing that the stipulation be signed up front puts the

prohibition against punitive damages squarely before the trial judge and focuses on the importance of this provision of the Settlement Agreement. It is especially appropriate in light of the contumacious behavior of certain lawyers subject to PTO No. 3888 in attempting to circumvent the punitive damages prohibition of the Settlement Agreement.

If the bifurcation stipulation was not required to be signed up front, the landscape would be no different from what it was before the Court of Appeals' decision in *In re Diet Drugs*. Parties have previously argued to trial judges for and against bifurcation without any involvement by this court. This was made known to the Court of Appeals at oral argument on December 10, 2003. Indeed, the Court even requested additional briefing on the matter. We do not think the Court of Appeals was merely authorizing us to put our imprimatur on a currently operating process. In sum, PTO No. 3888, in our view, provides the proper balance between our protecting the integrity of the Settlement Agreement's provision against punitive damages and the need to accommodate the notions of equity, comity and federalism. *See In re Diet Drugs*, 369 F.3d at 307; Settlement Agreement §§ IV.D.3.c., IV.D.4.c.

The stipulation for reverse-bifurcation itself should state that it is not effective unless and until the state court judge rules that reverse-bifurcation is advisable. In this way, the state judge will be on notice that he or she has the last word. Furthermore, once the stipulation has been filed, the injunction is not intended to prevent the parties from providing any input requested by the judge as to the advisability of reverse-bifurcation.

Some plaintiffs argue strenuously that state law prohibits or discourages reverse-bifurcated trials. No one has called to our attention any state which precludes such a trial on consent. The state court, of course, will have the final say on reverse-bifurcation. It must be remembered that class members, unlike litigants in other situations, are subject to the terms of the Settlement Agreement. While other litigants may sue Wyeth for punitive damages if permitted by state law, the class members here may not do so even if state law otherwise allows such damages. What this court has ordered is a procedure to enforce "a central pillar" of the Settlement Agreement against the attempts by a few class members and their attorneys to undermine it. *In re Diet Drugs*, 369 F.3d at 306. Under PTO No. 3888, we believe class members subject to it will be able to litigate fairly their claims consistent with the Settlement Agreement while at the same time the intrusion into the state court proceedings is being minimized. *Id.* at 317. If those in the front ranks who are subject to PTO No. 3888 are successful in their assault on the Settlement Agreement, the tens of thousands watching and waiting in the rear will not be far behind.[1]

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[1] There are over 50,000 intermediate and back-end opt-out class members.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: DIET DRUGS (PHENTERMINE/ FENFLURAMINE/ DEXFENFLURAMINE) PRODUCTS LIABILITY LITIGATION	:	MDL DOCKET NO. 1203
THIS DOCUMENT RELATES TO:	:	
SHEILA BROWN, et al.	:	
v.	:	
AMERICAN HOME PRODUCTS CORPORATION	:	CIVIL ACTION NO. 99-20593

PRETRIAL ORDER NO. 3962

AND NOW, on this 22nd day of September, 2004, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the emergency motion of opt-out plaintiffs to stay PTO No. 3888's injunction pending appeal is GRANTED in part and DENIED in part; and

(2) said injunction is stayed as to any plaintiff who obtains a postponement of his or her trial until the Court of Appeals decides the pending appeal. Otherwise the motion for a stay is denied.

BY THE COURT:

/s/ Harvey Bartle
J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 04-3591, 04-3643 and 04-4096

IN RE: DIET DRUGS (PHENTERMINE/
FENFLURAMINE/DEXFENFLURAMINE)
PRODUCTS LIABILITY LITIGATION

Clara Clark and her agents, attorneys and derivative claimants; Linda Smart and her agents, attorneys and derivative claimants; Linda Eichmiller and her agents, attorneys and derivative claimants; Crystall Gatlin and her agents, attorneys and derivative claimants; Lonelle James and her agents, attorneys and derivative claimants; Doris Caldwell and her agents, attorneys and derivative claimants; Mitzi Wilson and her agents, attorneys and derivative claimants; Brenda Cook and Richard Cook and their agents, attorneys and derivative claimants,

Appellants at No. 04-3591

IN RE: CLARA CLARK, and her agents, attorneys and derivative claimants; LINDA SMART, and her agents, attorneys and derivative claimants; LINDA EICHMILLER, and her agents, attorneys and derivative claimants; CRYSTALL GATLIN, and her agents, attorneys and derivative claimants; LONELLE JAMES, and her agents, attorneys and derivative claimants; DORIS CALDWELL, and her agents, attorneys and derivative claimants; MITZI WILSON, and her agents, attorneys and derivative claimants; BRENDA COOK and RICHARD COOK, and their agents, attorneys and derivative claimants,

Petitioners at No. 04-3643

IN RE: DIET DRUGS (PHENTERMINE/
FENFLURAMINE/DEXFENFLURAMINE)
PRODUCTS LIABILITY LITIGATION

Clara Clark and her agents, attorneys and derivative claimants; Linda Smart and her agents, attorneys and derivative claimants; Linda Eichmiller and her agents, attorneys and derivative claimants; Crystall Gatlin and her agents, attorneys and derivative claimants; Lonelle James and her agents, attorneys and derivative claimants; Doris Caldwell and her agents, attorneys and derivative claimants; Mitzi Wilson and her agents, attorneys and derivative claimants; Brenda Cook and Richard Cook and their agents, attorneys and derivative claimants,

Appellants at No. 04-4096

BEFORE: SCIRICA, Chief Judge, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, VAN ANTWERPEN and WEIS,* CIRCUIT JUDGES

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellants having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the

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* Judge Weis limited to panel rehearing only.

decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED.

BY THE COURT:

/s/ Joseph F. Weis, Jr.
U.S. Circuit Judge

DATED: February 24, 2005

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